THE DUTY TO BARGAIN

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INTRODUCTION

To what extent the passage of the Wagner Act in 1935 usurped forever the right of employers to make their own decisions concerning any subject matter which might fall within the broad area of "rates of pay, wages, hours of employment or other conditions of employment" if their employees had designated a union to represent them, is one of the most important questions which the National Labor Relations Board (herein called the Board) has been called upon to answer during the past 20 years.

The Wagner Act[1] declared it to be an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a)." (section 8 (a) (5)). Section 9 (a) defined representatives for the purposes of collective bargaining.[2] During the early Wagner Act days, when it was occupied for the most part with establishing the constitutionality of the Act and the scope of its control over interstate commerce in the areas assigned to it, the Board was not presented with many of the more complex problems concerning the interpretation of section 8 (5) of the Act and its effect on our economy which subsequently arose. In these early days employers frankly refused to bargain with unions on many occasions, relying on the alleged lack of authority in the Board to compel them to do so because of constitutional or jurisdictional obstacles. Thereafter, from 1937, when the first cases were determined by the Supreme Court involving the constitutionality and the scope of the meaning of interstate commerce under the Act, the Board was confronted primarily by two problems in connection with its obligation to compel bargaining on the part of an employer whose employees were represented by a union under the Act's provisions: (1) what conduct on the part of employers constituted refusal to bargain and (2) what subjects were included within the scope of collective bargaining. The development of the Board's decisional policy in regard to these subjects has been given extensive consideration by many writers. It would serve no useful purpose

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[1] National Labor Relations Act, 49 STAT. 449; 29 U.S.C. §151, §§151—(1935).

[2] Section 9(a) provided: "Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided,* That any individual employee or a group of employees shall have the right at any time to present grievances to their employer."

to repeat here the developments of these two aspects of the Board's decisional law. Suffice it to say that by 1947 when the so-called Taft-Hartley Act was passed,[3] the Board had fairly well established doctrines concerning both what conduct on the part of employers was required to meet the provisions of section 8 (5) of the Wagner Act and what subjects were included in that obligation.

The Taft-Hartley amendments, despite statutory changes such as the inclusion of the definition of bargaining in section 8 (d)[4] and the imposition of the collateral obligation to bargain on the part of a union representing the majority of the employees in section 8 (b)(3),[5] compelled no substantial immediate changes in the doctrines established in either of these decisional areas.

However, throughout the 112 volumes of reported decisions which the Board has issued since 1935 there have appeared certain decisional variations in some doctrines which go to the heart of the obligation of employers and unions to bargain under the Act. It is the purpose of this paper to discuss the present Board's thinking, as revealed in its current decisions, in regard to some of these important doctrines, against the background of prior determinations on the same subjects.[6] This approach may reveal what service, if any, the federal controls imposed by the Act on management and labor have rendered in this significant field of our economy, controls by which Congress intended to secure the peace which is essential to all phases of our industrial life. It is proposed to consider two representative areas in which such doctrines have developed: (1) The doctrine of majority representation, including (a) what determines whether an employer is obliged to bargain with the union, even though its

[3] National Labor Relations Act, as amended 61 STAT. 136; 29 U.S.C. Supp. V, §151 (1947) herein called the Act.

[4] Section 8(d) provides in part: "For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party to agree to a proposal or require the making of a concession . . ." No attempt will be made here to discuss the proviso to section 8(d).

[5] Section 8(b) (3) provides: "It shall be an unfair labor practice for a labor organization or its agents . . . to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 9(a)." Generally speaking the Board has applied the same standards in viewing refusals to bargain by unions under section 8(b) (3) as it has to employers under section 8(a) (5). Since the union obligation did not exist under the Wagner Act, and this consideration involves a comparative study, the doctrines will be discussed herein in terms of their application to employers only.

[6] By "present Board" is meant the Board as composed of Chairman Farmer and Members Murdock, Peterson, Rodgers, and Beeson. Although Member Beeson has been replaced by Member Leedom, the latter has not as yet participated in any published decisions involving these principles.

employees have not selected that union by a secret ballot election and (b) how long the Board will compel a determination of majority to endure without requiring a new determination of majority representation; and (2) The doctrines which determine what specific criteria have come to indicate compliance with the requirements of the Act.

1. Majority Representation.

Since an employer is only obliged to deal with the representative of its employees as defined by section 9 (a), it is essential to any situation in which the Act attempts to control the conduct of the parties in their bargaining that the Board determine that such a representative in fact has been selected by a majority of the employees within an appropriate unit.

A. *When a majority determination may be made in the absence of a secret ballot election.*

At the outset it must be understood that the Board may determine what, if any, union represents a majority of the employees of an employer in an appropriate unit in two different proceedings, depending upon how the case arises. If a union seeks to be certified as a majority representative, the Board acts through a representation proceeding, pursuant to section 9 of the Act. On the other hand the Board must, in a proceeding in which an employer is alleged to have refused to bargain in violation of section 8 (a)(5), determine whether or not the union in fact is the representative of such employees within the meaning of section 9 (a).

Prior to the Taft-Hartley amendments, the Board could make a majority determination in a representation proceeding, upon the filing of a petition by a union, by any means it chose, including a check of authorization cards against the employer's payroll, an election, or by any other means it felt appropriate.[7] When the Wagner Act was amended, however, an election became mandatory as a means of determining employee representatives in a proceeding under section 9 (c). However, section 9 (a) remained unchanged insofar as is pertinent to this discussion. Yet section 8 (a) (5) requires only that the representative with whom an employer is obliged to bargain under that section be a representative within the meaning of section 9 (a). This has resulted in a situation where the Board may compel an employer to bargain with a union as majority representative on the basis of a determination made by some means other than a secret ballot election that it is indeed the representative of a majority of the employees in an appropriate unit.

Accordingly, many representation proceedings potentially could

[7] Section 9(c) provided: ". . . Whenever a question affecting commerce arises concerning the representation of employees, the Board may investigate such controversy and certify to the parties, in writing, the name or names of the representatives that have been designated or selected. In any such investigation, the Board shall provide for an appropriate hearing upon due notice, either in conjunction with a proceeding under section 10 or otherwise, and may take a secret ballot of employees, or utilize any other suitable method to ascertain such representatives."

constitute refusals to bargain in violation of section 8 (a)(5), since in many representation cases the employer has refused to bargain with a union which is seeking certification and, of course, recognition, without such a determination by the Board. On an administrative basis the Board requires that the union submit evidence that it has been designated by only thirty percent of the employees in such unit in order to have the Board investigate to the end that it will direct an election. However, as a practical matter in many, many cases the petitioning union has in its possession cards designating it to represent them signed by over a majority of the employees in the unit. Accordingly, it would be possible for almost every representation case to present a set of facts in which the employer by refusing to recognize the union without a certification is, in fact, in technical violation of section 8 (a)(5).

Even under the Wagner Act the Board had, on occasion, refused to find a violation of section 8 (5) of that Act where the facts led it to believe that the employer's insistence on an election was a good faith request for reasonable proof of the union's majority status although the employer refused to consent to an election, even where there existed interference by supervisors violative of section 8 (1).[8] As a practical matter the board has long recognized the superiority of a secret ballot election as a means of determining whether the employees do in fact want to be represented by one or another union and has characterized union authorization cards as a notoriously unreliable method of determining majority status of a union. The number of duplicate signatures submitted by competing unions to support the showing of interest required when there is competition between two or more unions to represent employees shows that employees will sign cards designating a representative which may not be their real choice if they were casting a secret ballot.[9]

Accordingly, the Board has permitted employers to demand an election to prove the majority status of a union, with certain limitations, in a doctrine now known as the *Artcraft Hosiery* or *Joy Silk* doctrine because of the cases in which it was first enunciated. Under this doctrine an employer may question a union's majority and not be obliged to bargain until its majority status has been proved in a secret ballot election, provided, as the Board puts it, the employer is motivated by a good faith doubt as to the union's majority representation. The Board spelled this doctrine out in *Artcraft Hosiery Co.*,[10] when it said:

> We have held, and still hold, that an employer may in *good faith* insist on a Board election as proof of the union's majority but that an employer unlawfully refuses to bargain if its insistence on such an election is motivated, not by any *bona*

[8] Chamberlain Cooperative, 75 N.L.R.B. 1188 (1948). *See also* Roanoke Public Warehouse, 72 N.L.R.B. 1281 (1947).

[9] Sunbeam Corporation, 99 N.L.R.B. 546, 550 (1952); Midwest Piping and Supply Company, Inc., 63 N.L.R.B. 1060, 1070 (1945).

[10] 78 N.L.R.B. 333, 334 (1948).

> *fide* doubt as to the union's majority, but rather by a rejection of the collective bargaining principle or by a desire to gain time within which to undermine the Union. . . . The crucial issue in these cases is the Employer's motive at the time of the refusal to bargain. Whether in a particular case an employer is acting in good or bad faith, is of course a question which of necessity must be determined 'in the light of all the relevant facts in the case.' Among the factors pertinent to a determination of the employer's motive at the time of the refusal to bargain are any unlawful conduct of the employer. . . . the sequence of events, and the lapse of time between the refusal and the unlawful conduct.

Notwithstanding the "good faith" limits set forth in this case on the circumstances under which an employer would be accorded the privilege of having an election before he need accept the majority claim of a union, the Board in many subsequent cases appeared to find that, notwithstanding the rationale set forth in the *Artcraft Hosiery* case, an employer could insist upon an election when confronted by a claim of union recognition, but only so long as he did not engage in any other violation of the Act. Wherever there existed any conduct such as discriminatory discharges, speeches or statements to employees which it regarded as violations of other sections of the Act, or any unilateral acts on the part of the employer without negotiation with the union, it would not permit the employer to insist upon an election if there was evidence that a majority of the employees in a unit had signed union authorization cards. The Board then based a majority finding on such cards, and required the employer to bargain with the union without an election, concluding that the commission of such acts cast doubt on the employer's good faith in questioning the majority. See, for example, *Joy Silk Mills, Incorporated,*[11] wherein the Board reversed its trial examiner and found that the employer there involved did not have a good faith doubt as to the union's majority, but was motivated "rather by a rejection of the collective bargaining principle or by a desire to gain time within which to undermine the union", citing the *Artcraft* case. This doctrine found support in the courts when the *Joy Silk Mills* case was enforced.[12] To be sure, court approval of this doctrine would of necessity be almost universal, because it depended upon the limited issue of whether there was substantial evidence to support the Board's factual finding that the employer had no

[11] 85 N.L.R.B. 1263 (1949).

[12] Joy Silk Mills v. NLRB, 185 F. 2d 732 (C.A.D.C.) (1950), *cert. den.* 341 U.S. 914. *See also* NLRB v. Inter-City Advertising Co., 190 F. 2d 420 (C.A. 4) (1951); NLRB v. Kobritz, 193 F. 2d 8 (C.A. 1) (1951); NLRB v. W. T. Grant, 199 F. 2d 711 (C.A. 9) (1952), *cert. den.* 344 U.S. 928; NLRB v. Epstein, 203 F. 2d 482 (C.A. 3) (1953), *cert. den.* 347 U.S. 912; NLRB v. Howell Chevrolet Co., 204 F. 2d 79 (C.A. 9) (1953), *aff'd.* 346 U.S. 482 (1953); Smith Transfer Co. v. NLRB, 204 F. 2d 738 (C.A. 5); NLRB v. Stewart, 207 F. 2d 8 (C.A. 5) (1953); NLRB v. Stow Manufacturing Co., 217 F. 2d 900 (C.A. 2) (1954).

good faith doubt as to the union's majority. Particularly where an employer refused to consent to an election was the Board inclined to conclude that its asserted doubt as to the union's majority status was not advanced in good faith. *Houston and North Texas Motor Freight Lines, Inc.*[13] In that case, the trial examiner, in finding a lack of good faith doubt, had relied on a case which pre-dated the *Artcraft Hosiery* and *Joy Silk Mills* statements of Board policy and which placed a much heavier burden on the employer. *Rockwood Stove Works.*[14] In the *Rockwood* case the Board had stated: "It is also clearly established in decisions of the Board and the courts too numerous to cite, that where a labor organization represents a majority of employees in an appropriate unit, and advises the employer of that fact and makes a reasonable offer of proof of the said majority, the employer, unless there are extenuating circumstances such as claims by a rival union, may not lawfully withhold recognition and refuse to bargain on the grounds that the said labor organization has not been formally certified with the Board." In effect this placed on the employer the burden of showing "extenuating circumstances" when it sought an election as a condition to bargaining.

The Board continued to find that so-called "per se" violations by the unilateral granting of wage increases or violations by interrogation of employees denied an employer the privilege of having an election. In *W. T. Grant Co.*,[15] the Board stated: "There would have been nothing unlawful in the respondent's insistence upon a Board election if it had been motivated by a genuine doubt that the Union represented a majority of its employees. However, we cannot find that this was the case." *cf. Celanese Corporation of America.*[16] Yet by 1951 the Board consisting of Herzog, Houston, and Murdock, decided that an employer was not in violation of section 8 (a)(5) where it stated:

> "As we have frequently held,[4] an employer who, in good faith, questions the majority status of a union which demands recognition as the bargaining representative of his employees, may lawfully insist that the union prove its majority in a Board-conducted election. But if, in insisting upon an election, the employer is motivated, not by a *bona fide* doubt as to the union's majority standing, but by a rejection of the collective bargaining principle or a desire to gain time in which to undermine the union, the demand for an election is no defense to a refusal-to-bargain charge, if the union in fact represented the majority of employees in an appropriate unit at the time of the refusal to bargain."
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> "[4] *New Jersey Carpet Mills, Inc.*, 92 NLRB 604; *Artcraft Hosiery Company*, 78 NLRB 333."[17]

[13] 88 N.L.R.B. 1462 (1950).

[14] 63 N.L.R.B. 1297, 1325 (1945).

[15] 94 N.L.R.B. 1133, 1134 (1951), 199 F. 2d 711 (1952), *cert. den.* 344 U.S. 928 (1952).

[16] 95 N.L.R.B. 664 (1951), Members Houston and Murdock, dissenting

[17] Beaver Machine & Tool Co., Inc., 97 N.L.R.B. 33, 34 (1951).

In the *Beaver* case the Board concluded that it was not convinced that the respondent employer was acting in bad faith in insisting on an election, even though it had previously engaged in unfair labor practices by interfering with an employees' association and had subsequently committed a violation of section 8 (a)(1) by a foreman's warning to an employee. The Board held "its unlawful conduct was not of such a character or extent as to establish that its refusal to bargain without an election was based, as the Trial Examiner found, on a desire to avoid recognizing and dealing with an outside union unless compelled to do so, rather than on an actual good faith doubt as to the Union's majority." However, in that case another labor organization "was apparently still functioning as the employees' bargaining representative" (p. 35 n. 5).

Nevertheless, in many instances the existence of other conduct, before or after an employer refused recognition without an election, which constituted even a technical violation of the Act has been held to establish lack of good faith in requiring an election.[18] Yet a majority of the Board refused to find that the employer's doubt was not *bona fide* where, after the union's request for a consent election was agreed to, the employer engaged in violations of section 8 (a)(1) and discharged an employee in violation of section 8 (a)(3) of the Act,[19] a case which presaged a more limited application of the doctrine which was developing into a fiction whereby a demand for an election together with any violation, albeit unrelated in causal significance, was regarded as rebutting the good faith of the demand.

After Chairman Guy Farmer was appointed to the Board, on July 13, 1953, the first case in which he was called upon to apply the *Artcraft* doctrine indicated that his point of view differed sharply from that of the remaining Board members. When in August, 1953, the Board issued its decision in *Brown Truck and Trailer Manufacturing Company, Inc.*,[20] the difference of opinion became apparent. The trial examiner had found a refusal to bargain and determined that the employer had not advanced in good faith its doubt as to the union's majority under circumstances where the employer had closed its plant and transferred its operations to another town. When approached by the union, it questioned the union's majority. Because the company failed to disclose its impending move to the union, the trial examiner found that its question as to the union's majority was not advanced in good faith, although when originally called upon to recognize the union the employer had consented to an election. Because the employer had conveyed the impression that it was going out of business, the election was postponed. After the employer moved its operations, the union filed charges which the trial examiner

[18] *e.g.* Southern Pine Electric Cooperative, 104 N.L.R.B. 834 (1953), *enforced* 218 F. 2d 824 (C.A. 5).

[19] Glass Fiber Moulding Company, 104 N.L.R.B. 383 (1953), Members Houston and Styles dissenting.

[20] 106 N.L.R.B. 999 (1953).

and the Board sustained. Chairman Farmer, in his dissent, refused to concur in finding a union majority based upon anything other than an election, stating that the Board has acknowledged that authorization cards were an unreliable method of determining the majority status of the union. He said:

> Because of this fact and the ready availability of the Board's election machinery to determine the majority issue, the Board has turned more and more to the use of the secret ballot as the most conclusive and satisfactory method for determining whether or not a union's claim to majority status is well founded.

Acknowledging that as a matter of law an election is not necessary to establish the majority, he nevertheless stated:

> But I am of the opinion that reliance upon such secondary evidence—demonstrably less dependable than a secret ballot election—should be limited to extraordinary circumstances such as where the employer has, in an effort to avoid his obligations under the statute, engaged in *unlawful conduct dissipating the union's membership and making it impossible to hold a free and uncoerced election.* (Emphasis supplied.)

Again on August 26, 1953, in *Southeastern Rubber Manufacturing Co., Inc.*,[21] Chairman Farmer dissented, where the union had agreed to the holding of an election to determine its majority but lost 6 to 13. Once more Farmer condemned the reliability of membership cards as indicating the wishes of the employees, stating, "It is for this basic reason that the statute provides for Government-supervised tests of the employees' choice, and it seems to me plain that, except in extraordinary circumstances, we ought not to substitute a doubtful test for a conclusive one" (p. 994). The conduct of the employer on which the majority of the Board based its doubt as to his good faith was limited to the conduct of two company officials in interrogating some employees individually concerning how they felt about the union.

It was therefore not surprising when on October 29, 1953, in the *Walmac Company (Radio Station KMAC and KISS)*,[22] the Board (Member Murdock did not participate) announced a more definite limitation on the circumstances under which it would deny an employer the right to insist upon an election. The trial examiner had required bargaining without an election on the basis of authorization cards signed by six out of seven employees in the unit involved. The employer, on advice of counsel, had insisted upon a hearing when union representatives asked him to agree to a consent election. The union's representative thereupon proferred the signed cards to the employer who declined to inspect them. The Board reversed the trial examiner and found that there was no evidence that the employer had not in good faith doubted the union's

[21] 106 N.L.R.B. 989 (1953).
[22] 106 N.L.R.B. 1355 (1953).

majority in the absence of an election, reciting that apparently it was the theory of the trial examiner that the employer's bad faith in insisting upon an election stemmed solely from the fact that it had granted a few raises unilaterally subsequent to the request for recognition. It stated:

> Apparently, it is the theory of the Trial Examiner that in any situation where a union claims, but is denied, recognition as majority representative and the employer commits any form of unfair labor practice, *ipso facto*, the employer also thereby violates Section 8 (a)(5). We cannot agree with this principle, and past Board decisions do not support it.[23] The Board set forth the current version of its doctrine to be as follows:
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> Apart from the obvious fact that the scheme of the Act never contemplated that a violation of Section 8 (a)(1) should automatically constitute a violation of Section 8 (a)(5), there are facts in this case which point strongly to the rejection of any principle such as the Trial Examiner's.[3] There is no direct proof that the Respondent's refusal to bargain with the Union in the absence of a regular election was motivated by anything other than a doubt as to majority status. . . . The complaint therefore was predicated upon the theory that an employer who puts a claiming union to the test of a Board-ordered election runs the risk of automatically being ordered to bargain with that union—without an election to test its status—if the employer changes the working conditions of a few employees. . . .
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> We are unable to reach the conclusion reached by the General Counsel that the Respondent chose to insist upon a Board-ordered election—which normally is its right—because it was in bad faith motivated by an intention unlawfully to refuse to bargain with their chosen representative.
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> [3]*Harcourt and Company*, 98 N.L.R.B. 892 at 900-901.

This principle was applied later to a situation where without an election an employer refused to recognize a union and thereafter violated section 8 (a)(2) of the Act by dominating and interfering with an employee's committee.[24] Such conduct, the Board found, did not per se violate Section 8 (a) (5), since the employer's behavior, both before and after its refusal to recognize the union, despite the sponsorship of the committee, did not negate its good faith doubt as to the union's majority status at the time of the latter's demand for recognition.

Even before the *Walmac* case, the Board had, on occasion, refused to find bad faith in insistence on an election even where the employer subsequently had engaged in unilateral acts, such as granting merit and general wage increases, without consulting with the union. Thus, where a company had an established policy of insisting upon elections and not agreeing to consent elections, even though the union representatives had

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[23] Citing Beaver Machine & Tool Co., Inc., 97 N.L.R.B. 33 (1951) and I. Spiewok & Sons, 71 N.L.R.B. 770 (1947).

[24] Poe Machine & Engineering Company, Inc., 107 N.L.R.B. 1372 (1954).

displayed their designation cards to representatives of the employer, the trial examiner refused to find that "the Respondent had abandoned its policy or lost its right to demand certification" since he found this "would be to place a premium on a technicality, especially since there is no evidence of bad faith on the Respondent's part."[25]

Prior to the *Goodrich* case, the refusal to consent to an election had been regarded as a very significant point in determining whether or not the employer had exhibited good faith doubt in insisting upon an election.[26]

Since the *Walmac* case the Board has, in general, followed the doctrine as established there, although it has varied it to some extent in regard to the strictness with which it has viewed other acts on the part of an employer as indicative of its bad faith in insisting upon an election. Thus, an employer's doubt as to a union's majority and the unit it sought was held not to have been expressed in good faith where a certification was insisted upon by its supervisor in charge of labor relations for the area, but a store manager had engaged in threats in violation of section 8 (a)(1), on the ground that the employer could not have been motivated by a good faith doubt because "while one agent of the Respondent was insisting upon an election, another was engaging in an extensive series of unfair labor practices calculated to undermine the Union's majority".[27] This is in contrast to its decision in *Blue Flash Express, Incorporated*,[28] where, even though an employer interviewed employees and questioned them individually as to whether they had signed union cards, the Board found that the questioning was not a violation of section 8 (a)(1) and did not cast doubt on the good faith motive of the employer in questioning the union's majority.

In determining the good faith of an employer's doubt as to a union's alleged majority, the board considers other conduct of the employer which may reveal his motive in challenging the union's status. The board professes that whether such conduct of the employer constitutes a violation of some additional section of the act is not controlling upon it in reaching determinations as to his bona fides in refusing to accord recognition to the union upon its assertion of majority representation. Yet it is apparent that the Board's changing policies in regard to violations of section 8 (a)(1) do influence whether an employer's insistence upon an election as proof of majority will be regarded as advanced in good

[25] B. F. Goodrich Company, 106 N.L.R.B. 757 (1953). A panel consisting of Members Murdock, Styles, and Peterson adopted his Intermediate Report and dismissed the complaint without a decision.

[26] *e.g.* Clearfield Cheese Company, 106 N.L.R.B. 417 (1953) and cases cited in the Intermediate Report therein at p. 440; but see cases cited by dissent in Glass Fiber case, supra, at p. 387, note 10.

[27] Safeway Stores, Incorporated, 110 N.L.R.B. 242 (1954), *see also* Idaho Egg Producers, 111 N.L.R.B. No. 12 (1955).

[28] 109 N.L.R.B. 85 (1954).

faith. For example, an employer has been denied the right to insist upon an election as proof of majority where his employees were threatened and questioned by supervisors and the employer authorized and sponsored an anti-union petition in violation of section 8 (a)(1) and the threat was made almost at precisely the time when the employer was refusing the union's bargaining request, even though the employer consented to the holding of an election.[29]

Again, in *Wheeling Pipeline, Inc.*,[30] released January 22, 1955, the Board adopted, without comment, an intermediate report recommending a finding of an 8 (a) (5) violation in view of the trial examiner's conclusion that the employer did not in fact have a good faith doubt as to the union's majority, where shortly before his refusal the employer had discharged an employee for union activity and supervisory employees had engaged in interrogation of and threats directed against employees and one supervisor had stated that the company would never recognize the union. See also *Ben Corson Manufacturing Co.*, where other unfair labor practices by an employer were held to have defeated the right to an election. It is clear, however, that the present Board requires substantial, not technical, violations of other sections of the Act to impune the good faith of an employer in demanding an election.

Chairman Farmer dissented from the Board's decision in the *Taylor-O'Brien* case,[31] released on April 6, 1955, insofar as its findings were contrary to the recommendations of the trial examiner. It is interesting to note that his dissent does not refer to the *Brown* or *Southeastern* cases, *supra*, but relies solely on the weight to be accorded the trial examiner's findings. It may be that the *Walmac* principle, as it has subsequently been applied, meets the objections Chairman Farmer originally advanced as to authorization cards as proof of a union's majority.

Although there are pre-Taft-Hartley amendment cases which anticipate the rationalization which underlies the *Artcraft* doctrine,[32] it was not necessary to rely on such a doctrine heavily until the amendments to the Act, since even in representation proceedings, prior to the amendments, the union's majority could be determined by some means other than an election. When, however, Congress proscribed the determination of a majority in representation proceedings by anything other than an election, the Board reached a point where it looked more charitably at an employer's

[29] Taylor-O'Brien Corporation, 112 N.L.R.B. No. 2 (1955); *but see* A. L. Gilbert Company, 110 N.L.R.B. No. 231 (1954), where a majority of the Board, consisting of Farmer, Rodgers, and Beeson found no violation of section 8(a) (5) despite the conduct of polls by the employer; cf. Pryne Moulding Corp., 110 N.L.R.B. No. 240 (1954), where the Board found a "lack of sincerity" on the employer's part because of other subsequent unfair labor practices.

[30] 111 N.L.R.B. No. 43 (1955). *See* Ben Corson Manufacturing Co. 112 N.L.R.B. No. 46 (1955).

[31] See note 29, supra.

[32] See the Chamberlain Cooperative, *supra;* Roanoke Public Warehouse, 72 N.L.R.B. 1281 (1947) (Houston dissenting).

insistence on one. But after the *Artcraft* doctrine was enunciated, as noted above, there arose a number of cases in which in an arbitrary and automatic fashion the employer was denied the right to demand an election if there existed, either before or after his insistence, any conduct on the part of a supervisor which might be regarded as a violation of any other section of the Act. The *Walmac* case was to remedy this. While Chairman Farmer's dissents in the *Brown* and *Southeastern* cases indicated that he would take a more extreme stand against upholding findings of majorities in section 8 (a)(5) cases made on any evidence other than elections, nevertheless the *Walmac* decision appears to have resulted in a sufficient compromise of the *Artcraft* doctrine to have met with his approval. Until other factors or changing Board personnel alter the situation, it would appear that that case and its subsequent interpretations set forth the current state of the Board's thinking on this subject.

To what extent the changes in the economic atmosphere promulgated by the 1947 amendments, rather than the amendment of section 9, influenced the difference in Board thinking displayed between the *Rockwood* and *Artcraft* decisions would be speculative. Chairman Farmer's dissents in the *Brown Truck* and *Southeastern Rubber* cases appear to be based primarily upon a personal distrust of the unreliability of card majorities. Hence, the *Walmac* doctrine as presently applied would seem to stem more from the advancing experience of the collective Board in the realities of industrial relations in the light of a developing maturity on the part of employers and unions in accepting the controls imposed by the Act than from other causes.

It is to be observed that although the decisions do not stress this consideration, the real significance of this doctrine is its effect on the right of the employees to express their choice and not to have a bargaining representative imposed upon them without the ability to resort to a secret ballot. It has been properly held that it ill behooves an employer who has violated the Act to plead on behalf of the rights of his employees, particularly where his conduct has prevented the election from disclosing their choice freely.[33] However, the Board has adequate machinery for controlling the timing of an election and compelling its conduct in an atmosphere free of coercion. To have a majority determined, because of the errors of an employer, on the basis of anything but a fair and secret election does not appear, in the public interest, to solve this problem.

B. Loss of Majority

The second line of Board decisions in which some significant doctrines have evolved concerning the determination of majority representatives has to do with the duration of majority determinations and has at last achieved some stability through the decision of the Supreme Court on December 6,

[33] See Brooks case, *infra; see also* Ben Corson Manufacturing Co., 112 N.L.R.B. No. 46 (1955).

1954, in *Brooks* v. *N.L.R.B.*[34] The decisional variation which occurred in these doctrines was not attributable to the Board but to the courts. The Board has been uniformly consistent in its position on these doctrines from the start. The Supreme Court in the *Brooks* case set forth the "working rules" which it found that the Board had evolved in exercising its authority under the Wagner Act to certify a union as the exclusive representative of the employees in the bargaining unit when it had determined that the union commanded majority support as follows:

> (a) A certification, if based on a Board-conducted election, must be honored for a 'reasonable' period, ordinarily "one year" in the absence of "unusual circumstances" . . .
>
> (b) "Unusual circumstances" were found in at least three situations: . . . (1) the certified union dissolved or became defunct; . . . (2) as a result of a schism, substantially all the members and officers of the certified union transferred their affiliation to a new local or international; . . . (3) the size of the bargaining unit fluctuated radically within a short time. . . .
>
> (c) Loss of majority support after the 'reasonable' period could be questioned in two ways: (1) employer's refusal to bargain, or (2) petition by a rival union for a new election. . . .
>
> (d) If the initial election resulted in a majority for a "no union", the election—unlike a certification—did not bar a second election within a year.[35]

The *Brooks* case involved a situation where immediately after an election and without any instigation by the employer a group of employees repudiated the secret ballot vote and sought to withdraw from the union. The Supreme Court decision clearly established the validity of the Board's one-year rule in regard to the duration of certifications. The result is that where there has been an election and a certification the Board will not permit an employer during that period to avoid bargaining with the certified representative even though it has reasonable grounds to believe that the certification no longer represents the employees' choice. This is doubtless a sound administrative rule. Congress, not the Board, has made this rule less inflexible. The Board originally presumed a continued majority in a certified representative for a reasonable period, ordinarily a year, in the absence of extraordinary circumstances.[36] However, the Taft-Hartley amendments made it impossible for the Board to conduct a second election within one year. Therefore, even if extraordinary circumstances exist, the Board is without power to hold a re-determination of representatives on a formal basis.

The more difficult problems arise in connection with situations where there has been no formal certification. As we have seen, both before and

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[34] Brooks v. N.L.R.B., 348 U.S. 96 (1954).

[35] 35 L.R.R.M. 2158-2159.

[36] See Wells Dairies Cooperative 111 N.L.R.B. No. 169 (1955), wherein the Trial Examiner traces the consistent history of the Board's policy in this regard.

after the 1947 amendments, the Board has been authorized in cases involving allegations of refusal to bargain in violation of section 8 (a)(5) to determine that a union represents employees by some means other than an election. Where such a determination has been made and an employer has been obliged to bargain with the union, the question arises as to whether and under what circumstances it can refrain from continued bargaining or continued recognition on the ground that changed circumstances have negated the majority determination previously made.

Where unfair labor practices have followed the determination there has been no real problem. On April 10, 1944, the Supreme Court sustained the Board in its position in two cases.[37] Both those cases were decided at a time when the Board could, by certification proceedings or otherwise, determine the majority status of the union without the conduct of an election. In each case a majority of employees had designated a union to represent them without an election. In the *Franks* case, by the time the complaint had issued alleging that the employer had refused to bargain in good faith, the employees had indicated their desire to withdraw from the union. In the *Medo Photo* case, the employees had withdrawn from the union before the first bargaining conference was set. In both cases, the Board had found that conduct on the part of the respective employers had resulted in the employees' withdrawal of their authorizations of the union. Under those circumstances the Court held that the employer could not avoid bargaining, despite the fact that the employees had repudiated their designations, attributing such repudiation to the employers' conduct.

Where the determination of majority has been based upon a certification, even after a year, the employer must have reasonable grounds for believing that the union has lost its majority if it is to be relieved of its obligation to bargain further.[38] In that case, there had been a lapse of three years since the union's certification. The Board concluded that the question as to whether the employer had violated section 8 (a)(5) depended not on whether there was sufficient evidence to rebut the presumption of the union's continuing majority status or to demonstrate that the union in fact did not represent the majority of the employees, but upon whether *the employer in good faith* believed that the union no longer represented the majority of the employees.[39] It will be noted that this is the same test which the Board has applied in determining whether an employer in the first instance may question the union's majority in the absence of a formal determination of its representative status by an election. Today, however, in the absence of a prior refusal to bargain, an employer can properly, at the end of the certification year, if a decertification petition is filed by its employees requesting a re-determination of

[37] Medo Photo Supply Corp. v. N.L.R.B., 321 U.S. 678 (1943) and Franks Co. v. N.L.R.B., 321 U.S. 702 (1943).

[38] Celanese Corporation of America, 95 N.L.R.B. 664 (1951).

[39] See also Squirrel Brand Co., Inc., 104 N.L.R.B. 289 (1953).

the union's representative status, question the union's continued status and avoid further bargaining.[40] Accordingly, although the Supreme Court in the *Brooks* case stated: "The Board has on several occasions intimated that even after the certification year has passed, the better practice is for an employer with doubts to keep bargaining and petition the Board for a new election or other relief" [citing cases], it would appear that the current position of the Board is that after a certification year the tests for good faith doubt as to the union's continued majority are not unlike those which justify the employer questioning the union's representative status initially under the *Artcraft Hosiery* doctrine referred to above.

Where there has been no bargaining between the parties until after the entry of a court decree enforcing the Board's order, the Board has, without regard to the date of the certification, if any, refused to entertain decertification petitions until it is satisfied that there has been bargaining in good faith in compliance with the decree.[41]

A final problem as to the duration of a majority is presented by those cases where the majority determination was not based upon an election and where there have been no subsequent unfair labor practices. The question here is whether the same presumptive duration is to be attributed to a Board order directing an employer to bargain with a union as to a formal certification. The "reasonable time" rule has been applied to Board orders in the absence of a prior certification, and even to settlement agreements.[42]

In the *Brooks* case, the Supreme Court rejected a contention by the employer that since a bargaining agency may be ascertained by methods less formal than a supervised election, informal repudiation should also be sanctioned where decertification by another election is precluded by the one-year rule. The Supreme Court concluded: "This is to make situations that are different appear the same." Notwithstanding this summary rejection of the contention by the Court, there are, as a consideration of the developments of the doctrines recited above discloses, some very difficult questions presented by the changing position of the Board in regard to when (1) an employer may properly question a union's majority without an election, and (2) when an employer or individual employees, for that matter, may subsequently have the question of the union's continued majority reconsidered. This is especially true if the Board has determined that the union represents the majority by some means other than an election.

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[40] American Laundry Machine Company, 107 N.L.R.B. 1574 (1954).

[41] See Aldora Mills, Case No. 10-RD-78, decided February 23, 1951 (unreported); West Texas Utilities Co., Case No. 16-RD-76, *decided* December 12, 1951 (unreported). These cases are not usually reported because they arise by the administrative dismissals of petitions for elections.

[42] See Poole Foundry & Machine Co. v. N.L.R.B., 192 F. 2d 740 (1952), *cert. den.* 342 U. S. 954 (1952).

In short, as to the Board doctrines in regard to the presumption of continued majority, the original rule was that it would be presumed that a majority once established (whether by a certification or by a Board order) would continue for a reasonable time, usually to be regarded as one year. The amendments in 1947, by precluding the Board's holding more than one election in a year, resulted in its having to tighten that rule insofar as certifications were concerned.[43] The question of how long a majority will be presumed to continue either beyond the certification year, or in the absence of a certification, where there has been good faith bargaining pursuant to a Board order or court decree, is one which has to be decided on individual facts. It therefore will probably result in varying determinations, not unlike those which we have seen result under the doctrines for determining whether an employer may initially question the union's claim of majority representation in the absence of an election.

There appears to be little correlation between the changing personnel of the Board or political or other non-legal factors and the evolution and application of the Board's doctrines on the duration of the obligation to bargain without a redetermination of representatives. The Board's insistence on stability, especially following a certification, has a sound administrative basis. Nor can there be any quarrel with its refusal to permit an employer, by its illegal acts, to dissipate a majority once established.

On the other hand, from a practical management point of view it is preposterous to force an employer and his employees to deal with each other through a representative which the employees do not want.

Despite Board orders or court decrees, realistic unions often abandon such situations. It is to be hoped that, in the absence of unfair labor practices by the employer, and in the absence of a formal certification, the Board may become more realistic in permitting the questioning of a union's majority and permitting redeterminations without regard to requirements based on arbitrary periods of time.

II. Good Faith Bargaining: Criteria For "per se" Violations.

As Board doctrines developed regarding the conduct which was required on the part of employers to meet their obligation to bargain, the concept of "good faith" in collective bargaining arose, although the words themselves do not appear in the Wagner Act. An outright refusal to meet and negotiate concerning any subject within the broad area of "rates of pay, wages, hours of employment, or other conditions of employment," the scope of collective bargaining as set forth in section 9 (a) of the Act, was of course held to be a violation of the Act.[44] Such a refusal was regarded as a refusal to bargain per se without regard to good faith on the employer's part.

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43 Brooks case, *supra* note 33. But see Oliver Machinery Corp., 102 N.L.R.B. 822 (1953), where certifications followed by illegal contracts were held to raise no presumption.

44 As noted above, the gradual process whereby the Board interpreted what subjects came within this area cannot be covered by this paper. The main con-

Furthermore, the Board reached the conclusion that it was a refusal to bargain per se if an employer unilaterally initiated, terminated, or modified any change in wages, hours, or other conditions of employment within the Board's broad interpretation of the scope of that phrase, once its employees had designated a bargaining representative, without first bargaining about the matter with such representative. Thereafter *any* unilateral act by an employer in this broad area came to be regarded as a refusal to bargain per se without regard to his good faith.

But where employers purported to negotiate as the Act requires, the Board was soon called upon to look behind the shams of purported bargaining and this meant determining whether the whole course of conduct of the employer displayed true bargaining, or as the Board put it, good faith bargaining. When the 1947 amendments were adopted, the Act for the first time defined collective bargaining, when it said:

> . . . For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession. . . .[45]

Obviously the entire factual picture in a given situation contributes to the determination of whether good faith has been displayed. Yet, as the volume of decisions grew, there appeared a tendency to extract elements from prior decisions which became criteria for the presence or absence of good faith bargaining, regardless of the context in which they appeared.

In short, the Board came to regard an employer as having refused to bargain without reference to his good faith where certain elements

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troversies involved whether so-called "fringe benefits" such as merit increases, pensions, profit-sharing, and so forth were included in this phrase and these were resolved in a series of decisions including NLRB v. Allison & Co., 165 F. 2d 766 (C.A. 6) (1948), *cert den.* 335 U.S. 814, *rehearing denied* 335 U.S. 905. (merit wage increases) and Inland Steel Co. v. NLRB, 170 F. 2d 247, 250-251 (C.A. 7) (1948), *cert. den.* 336 U.S. 960 (retirement or pension plan). The only significant recent issue in this area has involved the bargainability of stock purchase plans. In Richfield Oil Corporation, 110 N.L.R.B. No. 54 (1954), the Board found that unilateral action by an employer's adoption of a stock purchase plan was a violation of the Act. Member Beeson issued a vigorous dissent from this position. In view of the precedent well established before this issue was presented to the Board, it would have been impossible for it to have reached any other conclusion. In short, the Board's plenary interpretation of the scope of collective bargaining has met with wide success in the courts and is no longer a significant issue.

[45] Section 8(d).

appeared which it regarded as "per se" violations including (1) the express or implied refusal to bargain regarding any subject within the broad scope which the Board has held that phrase to cover; (2) unilateral acts on the part of the employer with reference to any such subject; and (3) certain types of conduct such as the refusal to sign a written contract or the refusal to furnish information to the union, and so forth.

Many of these elements were originally considered as part of factual complexes which showed, when taken together, the absence of true good faith in bargaining. But some of them came to be considered absolute criteria of "per se" refusals to bargain. It would appear that the current trend is to look at the surrounding circumstances rather than judge these factors in the absolute. We shall examine some of these elements or criteria to discover how policy trends have developed in this area.

A. *Refusals to bargain on compulsory subjects.*

Wherever any subject falls within the scope of compulsory bargaining, the Board has held the refusal to discuss such subject to be violative of the Act, regardless of the employer's motive in contending that it was a subject for the unilateral determination of management, on the theory that the "requisites of good faith bargaining cannot be found to exist when the lack of a legal requirement to bargain is uppermost in the [employer's] mind."[46] This was the position of the Board throughout the development of its policies regarding "fringe" benefits referred to in note 43. But it went further and held that the withholding of any subject within the scope of compulsory bargaining for the unilateral determination of management was not a bargainable issue. However, the Supreme Court put an end to this in 1952 when it reversed the Board's decision in *American National Insurance Company*,[47] sustaining a decision of the Fifth Circuit which held that an employer might properly refuse to enter into a contract unless the union agreed to a broad "management prerogative" clause retaining to the sole determination of management numerous matters clearly within the scope of compulsory bargaining.[48]

While an outright refusal to discuss such a subject is doubtless still a "per se" refusal to bargain in the Board's eyes, it has come to be much more realistic about looking to the good faith of the entire negotiations before basing a violation solely on an insistence to withhold certain subjects from bilateral determination.[49] The Board has finally come to look

[46] Reed & Prince Mfg. Co., 96 N.L.R.B. 850, 857 (1951), *enforced* 205 F. 2d 131 (1953), *cert. den.* 346 U.S. 887 (1954).

[47] 89 N.L.R.B. 185 (1950).

[48] NLRB v. American National Insurance Company, 343 U.S. 395 (1952).

[49] For instance, while grievances are clearly within the area of compulsory bargaining, see United States Gypsum Co., 94 N.L.R.B. 112 (1951) the refusal to agree to arbitration is no longer a violation of section 8(a) (5) per se. Harcourt & Co., Inc., 98 N.L.R.B. 892 (1952); Old Line Insurance Co., 96 N.L.R.B.

at the substance rather than the surface of an employer's "refusal to negotiate" concerning various subjects when the employer "was not an experienced negotiator" and obviously meant he would not "agree" to the union's proposals.[50]

Even after the *American National Insurance* decision, the Board appeared reluctant to interpret the Supreme Court's decision as inclusively as its broad language seemed to imply.[51] For example, in *Dixie Corporation*,[52] an employer was again found to have violated section 8 (a)(5) *inter alia* by insisting on a broad management prerogative clause. The present Board has not been called upon to decide any close cases involving whether and in what manner bargainable subjects may be contractually waived as matters for joint union-management participation. Since questions involving the scope of collective bargaining will not be apt to reappear—employers are not even questioning that "guaranteed annual wage" is within the scope of compulsory bargaining—decisions in this area will probably be confined to factual issues as to whether the pattern of negotiations reflects "hard bargaining" or bargaining with such a closed mind as to show lack of good faith, a field in which the ground rules have been thoroughly laid out by now.

B. *Unilateral acts as per se violations.*

In early cases the original Board concluded that when an employer was under an obligation to bargain it could not, consistently with that obligation, take any unilateral action in regard to any subject covered thereby, since to do so would serve to undermine the status of the employees' representative. Hence such action constituted a violation of section 8 (a)(5) as well as of section 8 (a)(1), per se, without regard to the employer's motive. Originally the Board placed no limits on its ban on unilateral employer action. However, the Supreme Court held[53] that, once a bona fide impasse had been reached in negotiations, an employer might put into effect any offers made to a union on which an impasse had been reached, since a grant of benefits by the employer ". . . might well carry no disparagement of the collective bargaining proceedings. Instead of being regarded as an unfair labor practice, it might be welcomed by the bargaining representative, without prejudice to the rest of the negotiations." But the Board was reluctant to find that such a bona fide impasse had occurred.[54]

499 (1951). *See also* Textron Puerto Rico, 107 N.L.R.B. 583, 584 (1953); McDonnell Aircraft, 109 N.L.R.B. No. 144 (1954); United Telephone Co., 112 N.L.R.B. No. 103 (1955).

[50] The Frohman Mfg. Co., Inc., 107 N.L.R.B. 1308 (1954).

[51] See Humphrey, *The Government at the Bargaining Table*, Syracuse L. Rev., 129-42 (1954).

[52] 105 N.L.R.B. 390, 399 (1953).

[53] NLRB v. Crompton-Highland Mills, Inc., 337 U.S. 217, 225 (1949).

[54] Bradley Washfountain Company, 89 N.L.R.B. 1662 (1950); Landis Tool Co., 89 N.L.R.B. 503 (1950); Crow-Burlingame Co., 94 N.L.R.B. 997 (1951); Reed & Prince Mfg. Co., 96 N.L.R.B. 850 (1951).

By 1950 the last Board of which Herzog was chairman was consistently applying this "per se" doctrine to instances of unilateral wage raises or unilateral employer action regarding the many subjects found by the Board to be within the field of obligatory bargaining.[55] This doctrine applied to unilateral action both during negotiations and after a contract had been signed, unless the contract granted the right to the employer to determine the matter unilaterally. But the Board has always shown great reluctance to find such a waiver, which must be express.[56]

The "new Board" (i.e., the Farmer Board of 1954) appears more inclined to look to the facts to determine whether unilateral action constitutes a violation, and has been more reluctant to base "per se" violations on such conduct. Where benefits were effectuated by an employer accompanied by a notice that they were "in accordance with the provisions of the pending union contract" the Board refused to find this either forbidden unilateral conduct or evidence of bad faith.[57] Yet where an employer, the day after an election "intensified its pre-election unfair labor practices" by wage raises and discriminatory discharges, on the basis of the whole picture the Board found a violation.[58] A unilateral wage increase continues to be a violation where it occurred along with other illegal acts which "whether considered separately or in their totality . . . constitute a refusal to bargain . . . ."[59]

Generally, recent cases seem to reveal a healthy practice of returning to the reasoning which led the original Board to look at all the facts, rather than find, as did later decisions, that a unilateral act by an employer was a violation without regard to either the motivation or real effect of that action.

C. *Other unfair labor practices as per se violations.*

Another area in which employer conduct came to be regarded as per se violative of section 8 (a)(5) was the commission by the employer

[55] *e.g.* Mason & Hughes, Inc., 86 N.L.R.B. 848 (1949); Dixie Culvert Mfg. Co., 87 N.L.R.B. 554 (1949); Valley Broadcasting Co., 87 N.L.R.B. 1144 (1949); Landis Tool Co., 89 N.L.R.B. 503 (1950); U. S. Gypsum Co., 94 N.L.R.B. 112 (1951); Graham County Electric Cooperative, Inc., 96 N.L.R.B. 1273 (1952). See also National Labor Relations Board, Twelfth Annual Report, 1947 pp. 35-36; Thirteenth Annual Report, 1948, p. 61; Fourteenth Annual Report, 1949, p. 78; Fifteenth Annual Report, 1950, p. 122.

[56] Tide Water Associated Oil Company, 85 N.L.R.B. 1096 (1949); The Standard Oil Co., 92 N.L.R.B. 227 (1950); The Jacobs Company, 94 N.L.R.B. 1214 (1951).

[57] Milwaukee Electric Tool Corp., 110 N.L.R.B. No. 167 (1954).

[58] Alexander Manufacturing Co., 110 N.L.R.B. No. 210 (1954); *see also* White Motor Company, 111 N.L.R.B. No. 204 (1955).

[59] Valley City Furniture Co., 110 N.L.R.B. No. 216 (1954), citing Top Mode, *supra,* Hallam & Hoggs Truck and Implement Co., 95 N.L.R.B. 1443 (1951); Tennessee Valley Broadcasting Co., 83 N.L.R.B. 895 (1949) note 7; and Jordan Bus Co., 107 N.L.R.B. 717 (1954) *(q.v.). See also* Idaho Egg Producers, 111 N.L.R.B. No. 12 (1955) (unilaterally granting Saturdays off).

of the violation of any other section of the Act while negotiations were pending, without regard to the motivation or effect of such conduct. Thus, if a supervisor made statements constituting interference in violation of section 8 (a)(1) or discharged an employee in violation of section 8 (a)(3), this conduct was regarded as derogating from the bona fides of the negotiations per se.[60] The last Herzog Board finally held that a violation of section 8 (a)(1) was not per se a refusal to bargain in good faith.[61] This is another place where it is to be hoped that the Board will examine the whole picture and not automatically find refusals to bargain based on fictions of bad faith stemming from other violations of which the negotiator may have no actual knowledge.

D. *Negotiation stands as per se violations.*

It would be impossible to consider here all the standards for conduct during negotiations which the Board has imposed in measuring whether the statutory requirements have been met. Its attitude on some of the positions which parties to negotiations have advanced is representative, however.

The Supreme Court soon upheld the Board's position that a refusal "to sign a written contract embodying the terms agreed upon . . . is a refusal to bargain within the meaning of the Act" in *Heinz Co.* v. *NLRB.*[62] Thereafter a refusal to incorporate the provisions agreed to in a written contract was regarded as a per se violation. Yet in a decision by Members Rodgers and Beeson (Peterson dissenting) the Board recently refused to find a refusal to execute a tentative agreement a violation where such refusal "was not motivated by opposition to collective bargaining."[63] Likewise the failure "to incorporate existing conditions of employment in a written agreement" came to be regarded as a per se violation.[64] However, the Farmer, Peterson and Rodgers Board (Murdock dissenting) refused to find that an employer violated section 8 (a)(5) by refusing to include in a contract its own policy on military service, albeit agreeing to abide by it.[65] Direct dealing with employees was also regarded as a violation per se.[66] This policy has not been weakened

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[60] Prigg Boat Works, 97 N.L.R.B. 290 (1951), *enforced* 197 F. 2d 150 (C.A. 5) (1952); Whiting Lumber Co., 97 N.L.R.B. 265 (1951); Apex Toledo Corporation, 101 N.L.R.B. 807 (1952); Globe Products Corporation, 102 N.L.R.B. 278 (1953).

[61] Harcourt & Co., 98 N.L.R.B. 892 (1952).

[62] 311 U.S. 514, 523 (1941).

[63] Milwaukee Electric Tool case, supra (1954).

[64] Gagnon Plating and Manufacturing Company, 97 N.L.R.B. 104, 107 (1951), *see also* Cheney California Lumber Company, 62 N.L.R.B. 1208, 1216 (1945); J. E. Cote, 100 N.L.R.B. 1486 (1952); James C. Ellis, 102 N.L.R.B. 497, 507 (1953).

[65] White Motor Company, 111 N.L.R.B. No. 204 (1955).

[66] U. S. Automatic Company, 57 N.L.R.B. 124, 135 (1944); Union Manufacturing Company, 95 N.L.R.B. 792 (1951); Louisville Container Corporation, 99 N.L.R.B. 81 (1952).

by more recent decisions.[67] The shifting of positions during negotiations was at one time regarded as in itself indication of bad faith bargaining.[68] But by 1953, even Herzog, Murdock and Peterson were looking more critically at the evidence before determining that the mere shifting of positions by an employer constituted "an act of bad faith,"[69] although it properly remains an element to be considered in determining good faith.[70] But the present Board has expressly rejected "the mere shifting of positions during bargaining by an employer" as "*per se* an unfair labor practice", maintaining that the Trial Examiner had "erroneously construed certain earlier Board decisions" as holding that.[71] The Board stated:

> Regardless of whether hasty or unreasonable withdrawals of specific concessions painstakingly achieved indicate bad faith in bargaining in a particular context, it does not follow that a party to collective bargaining is, in all contexts, rigidly bound to each and every tentative decision reached.

These are but examples of numerous types of conduct which were originally viewed as elements of bad faith in negotiations, which subsequently, at times, were regarded by the Board or its Trial Examiners as per se violative of the Act, and as to which current decisions reveal a tendency once more to establish violations only when viewed in context. This tendency relieves the parties during negotiations of having to resort to the "ritualistic formula or talismanic phrase" which Chief Justice Warren recently stated should not be required to secure legal rights.[72] This development appears more likely to be attributable to greater experience on the part of the collective Board and its agents than to extrinsic political factors. The same may be said for certain defenses on which employers have sought to rely in justification for conduct which the Board would otherwise regard as a refusal to meet their obligation to bargain.

III. Justification for Employer's Refusal to Bargain.

Even before the 1947 amendments imposed the obligation to bargain in good faith on unions seeking recognition, the Board has refused to find an employer guilty of bad faith in bargaining when the union's behavior justified the employer's action.[73] This policy has been followed

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[67] The Stanley Works, 108 N.L.R.B. No. 102 (1954). *But see* Harcourt & Co. supra, and Efco Manufacturing, Inc., 108 N.L.R.B. No. 52 (1954).

[68] Concordia Ice Company, Inc., 51 N.L.R.B. 1068 (1943); Gittlin Bag Company, 95 N.L.R.B. 1159 (1951), *enforced* 196 F. 2d 158 (4th Cir. 1952); Stanislaus Implement and Hardware Co., Inc., 101 N.L.R.B. 394, 395 (1952).

[69] Fehr Baking Company, 104 N.L.R.B. 240, 245 (1953).

[70] De Diego Taxi Cabs Co., 107 N.L.R.B. 1026, 1037 (1954).

[71] R. J. Oil & Refining Co., Inc., 108 N.L.R.B. No. 103 (1954).

[72] Julius Emspak v. U.S., 75 Sup. Ct. 687, 690, 23 Law Week 4248, 4249 (1955).

[73] Times Publishing Company, 72 N.L.R.B. 676 (1947).

in subsequent cases where the union was going through the motions of collective bargaining with its mind hermetically sealed.[74]

In recent years the Board has been much more strict in requiring a union to make a clear request for recognition in an appropriate unit, an obligation which the Supreme Court imposed long ago.[75] Thus, "a clear and unequivocal demand for collective bargaining" is now necessary to support a finding of a refusal to bargain.[76]

The greatest change from early Board doctrine in cases involving refusals to bargain in recent years has arisen in situations where the misconduct of the union has not merely been held such as to rebut evidence of the employer's bad faith, but actually to relieve the employer of its obligation to bargain. Thus, where a union engaged in an illegal slowdown this "negated the existence of honest and sincere dealing in the Union's contemporaneous request to negotiate." Hence, "the Respondent was not required to indulge in the futile gesture of honoring the Union's request."[77] Nor is an employer under a duty to bargain with a union which is threatening to engage in illegal activity.[78]

An unusual defense was sustained recently on behalf of an employer who refused to bargain with a union which had established a competitive business enterprise in the same locality and industry as the employer's.[79]

Conclusion

To summarize recent trends on the part of the Board in evaluating conduct which constitutes a failure to comply with the Act's compulsory bargaining requirements, it seems clear that of late the Board has placed much greater responsibility on the party, usually the union, which has requested bargaining. Here again the altered stress seems to have developed from viewing the pattern of negotiations in a more realistic light, rather than from either the 1947 amendments or subsequent political events. The Board has come to recognize that twenty years of compulsory recognition and bargaining have resulted in greater independence and responsibility on the part of labor organizations. In place of the more protective attitude towards unions displayed by the early Board in the atmosphere of employer resistance which surrounded its first efforts to

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[74] The Proctor & Gamble Manufacturing Company, 106 N.L.R.B. 2, 11 (1953). *Cf.* International Furniture Company, 106 N.L.R.B. 127, 129 (1953) and American Rubber Products Corp., 106 N.L.R.B. 73, 77 (1953), *reversed* 214 F. 2d 47 (7th Cir. 1954).

[75] NLRB v. Columbian Enameling & Stamping Co., 306 U.S. 292 (1939).

[76] McCann Steel Company, 106 N.L.R.B. 41, 50 (1953), *see also* Klinka's Garage, 106 N.L.R.B. 969 (1953) and cases cited in note 5; Mike Persia Chevrolet Co., 107 N.L.R.B. 377 (1953).

[77] Phelps Dodge Products Corporation, 101 N.L.R.B. 360, 368 (1952).

[78] Valley City Furniture Co., 110 N.L.R.B. No. 216 (1954); American Rubber Products Corp. v. NLRB, 214 F. 2d 47 (7th Cir. 1954).

[79] Bausch & Lomb, 108 N.L.R.B. No. 213 (1954).

enforce the Act and the legalistic interpretations of those early doctrines made arbitrarily in some instances, by the Board under Chairman Millis, the recent Board has come to regard unions and employers as experienced and evenly matched contestants in contemporary negotiations. Accordingly, the responsibilities and obligations of both parties have been imposed on that basis in current decisional policies involving the obligation to bargain collectively created by the Act. It is to be hoped that both management and labor organizations in their bargaining relations will mature to a point where each recognizes not only its duties to the other, but to the public as well. Then the need for the policing of their negotiations by the government will be minimized if not obliterated.